No. 37217-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF

FELIX JOSEPH D'ALLESANDRO,

PETITIONER.

PETITIONER'S SUPPLEMENTAL REPLY

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I. INTRODUCTION

Mr. D'Allesandro's trial was marked by two instances where the courtroom was closed and the public, including his family members, were excluded. Recent caselaw makes the outcome of this case crystal clear: reversal and remand for a new trial is required.

This Court has requested that the parties address three recent decisions: *State v. Paumier,* 155 Wn. App. 673, 230 P.3d 212 (2009); *State v. Bowen,* __ Wn. App. __, __ P.3d __, 2010 WL 2817197 (2010); and *In re Pers. Restraint of Crace,* __ Wn. App. __, __ P.3d __ , 2010 WL 2935799 (2010). Each of these cases fully supports reversal.

In order to rule in the State's favor this Court would have to overrule each of these decisions, as well as ignore additional binding Washington and United States Supreme Court precedent.

II. ARGUMENT

Introduction

The trial court closed Mr. D'Allesandro's courtroom twice—each time without conducting a *Bone-Club* hearing (or anything remotely resembling a *Bone-Club* hearing).

The state and federal constitutions guarantee the right to a public trial. While the public trial right is not absolute, it is strictly guarded to assure that proceedings occur outside the public courtroom in only the most unusual circumstances. *In re Pers. Restraint of Orange,* 152 Wn.2d 795,

804-05, 100 P.3d 291 (2004); *State v. Bone-Club,* 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). The guaranty of open criminal proceedings extends to voir dire. *Orange,* 152 Wn.2d at 804, 100 P.3d 291.

The Constitutional Requirement of a Pre-Closure Hearing

Recently, the Washington Supreme Court opinions in *State v. Strode,* 167 Wn.2d 222, 217 P.3d 310 (2009), and *State v. Momah,* 167 Wn.2d 140, 217 P.3d 321 (2009), initially appeared to create uncertainty about whether a complete *Bone-Club* hearing was always required before a courtroom was closed.

However, if those two opinions created uncertainty about the constitutional requirement, that ambiguity no longer exists. As this Court noted in *Paumier,* three months after the *Momah* and *Strode* decisions were handed down the United States Supreme Court decided *Presley v. Georgia,* __ U.S. ___, 130 S.Ct. 721, __ L.Ed.3d ___ (2010), a *per curiam* opinion holding that under the First and Sixth Amendments, voir dire of prospective jurors *must* be open to the public. 155 Wn. App. at 683.

This Court then summarized the applicable constitutional requirement:

> Noting that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials," *Presley,* 130 S.Ct. at 725, the Court reiterated that " '[a]bsent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire.*' " *Presley,* 130 S.Ct. at 724 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County,* 464 U.S. 501, 511, 104 S.Ct. 819, 78 L.Ed.2d 629

(1984) (*Press-Enterprise I*)). Moreover "trial courts are required to consider alternatives to closure even when they are not offered by the parties," this is because "[t]he public has a right to be present whether or not any party has asserted the right." *Presley,* 130 S.Ct. at 724-25.

Additionally, the trial court must make appropriate findings supporting its decision to close the proceedings.

There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing *voir dire.* But in those cases, the particular interest, and threat to that interest, must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."

Presley, 130 S.Ct. at 725 (quoting *Press-Enterprise I,* 464 U.S. at 510, 104 S.Ct. 819). The Court held that "even assuming, *arguendo,* that the trial court had an overriding interest in closing voir dire, it was still incumbent upon it to consider all reasonable alternatives to closure." *Presley,* 130 S.Ct. at 725. Thus, where the trial court fails to sua sponte consider reasonable alternatives and fails to make the appropriate findings, the proper remedy is reversal of the defendant's conviction. *Presley,* 130 S.Ct. at 725.

Thus *Presley,* applying the federal constitution, resolves any question about what a trial court must do before excluding the public from trial proceedings, including voir dire.

Paumier, 155 Wn. App. at 684-85.[2]

This Court reversed in *Paumier,* noting: "Here, the trial court closed a portion of voir dire by interviewing certain jurors in chambers. By shutting out the public without first considering alternatives to closure and making appropriate findings explaining why closure was necessary, the trial

[2] *Paumier* notes that the question is not whether a case is factually more like *Strode* than it is like *Momah* because "*Presley* has eclipsed *Momah* and *Strode* and controls the outcome of [closed courtroom] case[s]." 155 Wn. App. at 685.

court violated Paumier's and the public's right to an open proceeding. *Presley* requires reversal of Paumier's burglary conviction, and we so hold." *Id.*

The facts of the instant case are indistinguishable. In the case at bar, the trial court twice closed the courtroom, shutting out the public and D'Allesandro's family members, without first considering alternatives and/or making appropriate findings. Reversal is also required in this case.

The Record Fails to Support the Conclusion that D'Allesandro, Rather than the Court, Made a Deliberate Tactical Choice to Close the Court

This Court's more recent decision in *Bowen, supra,* provides further support for reversal. *Bowen* holds that an objection is not required to obtain reversal where the trial court fails to conduct a pre-closure hearing and where the defendant has not made "deliberate, tactical choices precluding him from relief." *Slip Opinion,* p.4.

This Court reversed in *Bowen,* noting that "the trial court, not defense counsel, proposed individual in-chambers voir dire of jury pool members." *Id.* The Court further noted in *Bowen,* "the record does not indicate circumstances requiring individual questioning of jurors in chambers, as opposed to another public location." *Id.* Finally, in *Bowen* the record contained "no indication that either [the Court] or the parties considered [the defendant's] right to a public trial or explained that right to him." *Id.*

The instant case suffers from the same infirmities.

Structural Errors Always Require Reversal

This Court held in *Bowen*: "Accordingly, we hold that this closure constituted structural error." *Id.*

A structural error always requires reversal whether considered on direct appeal or in a post-conviction setting. The United States Supreme Court has explained:

> In *Arizona v. Fulminante,* 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991), we divided constitutional errors into two classes. The first we called "trial error," because the errors "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt." *Id.* at 307-308, 111 S.Ct. 1246 (internal quotation marks omitted). These include "most constitutional errors." *Id.* at 306, 111 S.Ct. 1246. The second class of constitutional error we called "structural defects." These "defy analysis by 'harmless-error' standards" because they "affec[t] the framework within which the trial proceeds," and are not "simply an error in the trial process itself." *Id.* at 309-310, 111 S.Ct. 1246; *see also Neder v. United States,* 527 U.S. 1, 7-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

United States v. Gonzalez-Lopez, 548 U.S. 140, 148-149, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). *See also Sustache-Rivera v. United States,* 221 F.3d 8, 17 (1st Cir.2000) ("If [an error] did constitute structural error, there would be *per se* prejudice, and harmless error analysis, in whatever form, would not apply."); *Becht v. United States,* 403 F.3d 541, 549 (8th Cir.2005) (suggesting, but not deciding, that counsel's failure to raise a structural error on appeal would constitute *per se* prejudice); *McGurk v.*

Stenberg, 163 F.3d 470, 475 (8th Cir.1998) (holding that where counsel's deficient performance resulted in structural error, prejudice will be presumed); *United States v. Canady,* 126 F.3d 352, 364 (2d Cir.1997) (even though habeas petitioner had not raised public trial claim on direct appeal, deciding that he was entitled to relief because public trial claim is structural error).

When a claim of ineffectiveness is raised in a PRP, the standard of review is the "reasonable probability" *Strickland* standard. *Crace, supra* (*Slip Opinion* at p. 14). In *Crace,* this Court declined to adopt a heightened prejudice standard for an ineffectiveness claim raised in a PRP, "confident that a 'criminal defendant who obtains relief under *Strickland* does not receive a windfall; on the contrary, reversal of such a defendant's conviction is necessary to ensure a fair and just result.'" *Crace,* at 15, *quoting Kimmelman v. Morrison,* 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

Thus, where the error is "structural" reversal is required because the requisite harm is presumed as a result of the error.

However, even if that were not the case D'Allesandro has shown specific prejudice: the exclusion of family members from the beginning of the trial. As the Washington Supreme Court previously recognized in *Orange,* also a PRP case, "(a)s a result of the unconstitutional courtroom closure in the present case, what the prospective jurors saw, as they entered

and exited the courtroom during at least the first two days of voir dire, was not the participation of the defendant's family members in the jury selection process, but their conspicuous exclusion from it." *In re Pers. Restraint of Orange,* 152 Wn.2d 795, 812, 100 P.3d 291 (2004).

In sum, both old and new law mandate reversal.

III. CONCLUSION

Based on the above, this Court should reverse and remand for a new trial.

DATED this 4th day of August, 2010.

/s/ Rita J. Griffith
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/s/ Jeffrey E. Ellis
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CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on August 4, 2010, I served the parties listed below with a copy of Petitioner's Supplemental Reply In Support of Personal Restraint Petition as follows:

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Aug 4, 2010 Sea, WA
Date and Place

V. Bartley
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